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No. 84-194 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondent relies on a series of decisions — *Hicks* v. *United States*, 511 F.2d 407 (D.C. Cir. 1975); *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972); *Rogers* v. *United States*, 397 F.2d 12 (4th Cir. 1968); *Underwood* v. *United States*, 356 F.2d 92 (5th Cir. 1966); *Fair* v. *United States*, 234 F.2d 288 (5th Cir. 1956); and *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954) — in which, respondent asserts, a negligent failure by the government to supervise a person it knew to be dangerous was held to be actionable under the Federal Tort Claims Act. See Br. in Opp. 7-9, 11, 12. As we explained in the petition (Pet. 12-13 n.6), these cases rest on the principle that when the government undertakes a special responsibility for protecting the public from a person known to be dangerous — such as a prisoner (in *Rogers*) or a dangerous patient in a mental hospital (in

Hicks, Underwood, Fair, and *Panella*) — it must exercise due care in discharging that responsibility. None of these cases suggests that the government is responsible for supervising the off-duty activities of civilian or military employees generally.

Indeed, several of the cases cited by respondent are from the Fourth and Fifth Circuits, which have specifically adopted the position we urge here — that the government may not be held liable under the FTCA for the off-duty torts of its employees. See *Hughes* v. *United States,* 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes* v. *Sullivan,* 514 F. Supp. 667 (E.D. Va. 1980); *United States* v. *Shively,* 345 F.2d 294 (5th Cir. 1965). Moreover, as Judge Garth pointed out in his dissenting opinion below, in *Gibson* the Third Circuit itself was careful to confine its holding to cases in which the government accepted responsibility for protecting the public from persons known to be dangerous. See Pet. App. 19a-20a.

2. Respondent, like the court of appeals, attempts to distinguish the cases that conflict with the decision below — *Hughes* v. *United States, supra; United States* v. *Shively, supra; Naisbitt* v. *United States,* 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980); and *Wine* v. *United States,* 705 F.2d 366 (10th Cir. 1983) — by asserting that "there was a total absence of facts in these cases to suggest that the government knew or should have known either of the prior violent actions by the assailants or of the assailant's potential violence" (Br. in Opp. 9). As we demonstrated in the petition (Pet. 9), these cases cannot be distinguished in this fashion. In *Hughes,* the complaint alleged that the government employee whose off-duty acts damaged the plaintiff had previously engaged in precisely the same kind of behavior, and that the government had refused a request that the employee be assigned to a new position in which he would be less likely to injure members

of the public. See 662 F.2d at 219-220. In *Shively,* not only was there a sufficient allegation that the government was negligent in its supervision of the off-duty serviceman, but the district court ruled that the government was liable, and the court of appeals specifically agreed that the government's "negligence * * * was the proximate cause of the plaintiff's injury" (345 F.2d at 296). The court of appeals nevertheless held that the intentional tort exception to the FTCA barred the plaintiff's claim (*id.* at 297). In *Naisbitt,* the court of appeals noted that the plaintiff had alleged that "it was reasonably foreseeable" by the government that the off-duty serviceman who injured the plaintiffs "would, unless restrained, perpetrate serious injuries" (611 F.2d at 1351); the court of appeals nowhere suggested that this complaint, which was dismissed, was inadequate because it did not allege supporting facts with sufficient detail or specificity. In *Wine,* the government admitted, for purposes of its motion to dismiss, the facts underlying the plaintiff's claim of negligent supervision; the court of appeals affirmed the dismissal of the complaint on the ground that it was barred by the intentional tort exception.

3. Although respondent contends that "maintenance of the instant cause of action is not an attempt to 'second guess' military decisions" (Br. in Opp. 13), respondent's description of her suit belies this claim. Respondent concedes that her cause of action "is premised on the failure of Government officials to separate Private Heard from military service once they learned he was unfit for such service" (Br. in Opp. 11) and "attacks * * * the specific failure to remove Heard from active duty" (Br. in Opp. 13). These allegations constitute a direct challenge on behalf of the injured serviceman to military decision-making — how long a serviceman should serve, where he should serve, and in what capacity — and are precisely the sort of claim that is barred by *Feres.*

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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